No. 87-1015

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In The

Supreme Court of the United States

CHARLES F. MONAHAN, ET AL.,
Petitioners,

-vs-

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

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AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

STATEMENT OF AMICUS INTEREST

Since early in 1984 the Federal Trade Commission (hereinafter the "FTC"

or the "Commission") has initiated investigations and in some cases filed complaints and entered final orders in enforcement actions against state professional licensing boards in at least twenty states, asserting the authority to do so under Section 5 of the Federal Trade Commission Act. In New Jersey alone, five of the professional boards within the State Department of Law and Public Safety have been notified that the FTC is conducting a "preliminary nonpublic investigation" of their activities in promulgating advertising regulations which the FTC "believes" may violate 15 U.S.C. § 45 in that they may restrict competition and injure consumers. Without conceding that the FTC investigations were within the Commission's Congressionally authorized jurisdiction

and recognizing that the issue of whether such jurisdiction exists has not been settled by the courts, the New Jersey Boards cooperated to a limited extent with the investigations. However, document requests deemed to be overly burdensome were refused, and, with a few exceptions,* the Boards refused to concede that their challenged regulations were unnecessarily anticompetitive, in the face of strong pressure exerted by FTC representatives to repeal or to amend them in ways suggested by the Commis-

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* Pursuant to New Jersey law, Board regulations must be periodically reviewed and many of the Boards, in concert with the Division of Law and the Division of Criminal Justice, Antitrust Section, were already engaged in reviews of advertising regulations because of concerns over commercial speech and anti-competition issues.

sion.* With one exception the notices of the pending investigations included a request to "interview" the Board members and the Board's executive director. These requests were not pressed until November 2, 1987 when a letter was sent to the Board of Veterinary Medical Examiners asking that its members submit to depositions "voluntarily," stating that if the Board members refused, a subpoena would be issued.

New Jersey is, therefore, submitting an amicus brief in this matter in support

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* In the one case where a Board amended the only one of its regulations singled out by the FTC as unnecessarily anticompetitive (a regulation promulgated in 1970, but never enforced) the Board refused to agree to the entry of a proposed consent order which would have subjected the Board to direct oversight

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of petitioner because it appears likely that, should the decision at issue here be allowed to stand, the members of four of the affected New Jersey Boards and their executive directors (approximately 40 people in all) may also be subjected to compulsory process by the Commission, and may eventually be served with formal administrative complaints, as was the case with the Massachusetts Board of Registration in Optometry and others.

Amicus believes that the Federal Trade Commission's assertion of the jurisdiction to engage in such administrative enforcement actions against

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by the FTC in its future regulatory and disciplinary activities in the area of advertising regulation.

state agencies is in fact "plainly spurious" (cf. FTC v. Swanson, 560 F.2d 1, 2 (1st Cir. 1977)) and that the question of whether the FTC is mistakenly asserting this jurisdiction should be resolved promptly, not just because of the obvious substantial impact on the resources of the states involved and of the Commission itself, but because the Commission's assertion of such jurisdiction constitutes an unprecedented and possibly unconstitutional direct attack on state sovereignty that was never intended by Congress. The Commission's present activity therefore implicates important national policies of federalism vis a vis antitrust enforcement which can ultimately be resolved only by this Court. Amicus further believes that the instant case provides an appropriate factual

setting for the resolution of this important question. Amicus therefore urges that the petition be granted.

SUMMARY OF ARGUMENT

The Federal Trade Commission Act (hereinafter the "FTCA") was never intended by Congress to empower the Commission to enforce the antitrust laws against state boards and their members and to issue administrative orders purporting to bind the states' future regulatory and adjudicative conduct. Under settled principles of statutory interpretation, the Commission's jurisdiction over "persons, partnerships and corporations" should be deemed not to include such public entities. Moreover, the assertion of such jurisdiction by a federal administrative agency may be prohibited by Tenth Amendment principles.

This basic question should have been addressed by the Courts below where the FTC's authority even to investigate the Massachusetts Board was based on an assumption of just such jurisdiction. This issue is clearly not coextensive with the Parker state action immunity issue (See Parker v. Brown, 317 U.S. 341 (1943)) which the decision below addresses. In any event, on either issue the court below had before it sufficient information to make the required inquiries and to have decided as a matter of law that the subpoenas should not have been enforced.

ARGUMENT

STATE AGENCIES SUCH AS THE MASSACHUSETTS BOARD OF REGISTRATION IN PHARMACY ARE NOT "PERSONS" WITHIN THE MEANING OF 15 U.S.C. § 45 SUBJECT TO PROSECUTION IN AN ADMINISTRATIVE PROCEEDING BEFORE THE FEDERAL TRADE COMMISSION AND TO ADMINISTRATIVE CEASE AND DESIST ORDERS PROHIBITING PROMULGATION AND ENFORCEMENT OF REGULATIONS PURSUANT TO STATE LAW. THE SUBPOENAS ISSUED IN THIS MATTER WERE BASED ON THE COMMISSION'S PLAINLY SPURIOUS ASSERTION OF SUCH ENFORCEMENT AUTHORITY AND THEREFORE SHOULD NOT BE ENFORCED.

In the decision challenged by petitioners here, the Court of Appeals accepted as its first premise that resolution of the question of whether the FTC had any lawful purpose in issuing the contested subpoenas depends on whether the Board regulations were entitled to immunity under the doctrine first enunciated in Parker v. Brown, 317 U.S. 341 (1942).

The Court found that the immunity question involved a factual dispute which should not be settled in a subpoena enforcement proceeding (Pall). The Court of Appeals erred in this initial premise and its final decision.* The resolution of the question of whether the FTC had any lawful purpose in deposing the Board members depends in the first instance on whether the Commission has any statutory

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* With respect to the Circuit Court's disposition of the Parker "immunity" defense for enforcement of the subpoena, Amicus fully agrees with petitioners that the Parker issue should also have been decided in their favor on the record below, without the need for further fact-finding. The regulations at issue were identified and the nature and sufficiency of the "state action" involved in their promulgation and enforcement is clear from the Massachusetts statutory scheme and case law. Any information to be gleaned from an examination of the Board members would be irrelevant to a resolution of the issue.

authority to prosecute a state agency in an administrative proceeding for promulgating regulations allegedly violative of the antitrust laws, the admitted focus of the investigation below (Pa66 to Pa67). Amicus contends that the Commission lacks such authority.

The Federal Trade Commission is a creature of statute and cannot act in excess of the powers that have been delegated to it. Exxon Corp. v. F.T.C., 665 F.2d 1274, 1277 (D.C. Cir. 1981). These powers are derived from the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. The Act declares that "unfair methods of competition in or affecting commerce, and unfair and deceptive acts and practices in or affecting commerce are ... unlawful." 15 U.S.C. § 45(a)(1). The Commission is empowered to "prevent

persons, partnerships, or corporations" from engaging in such proscribed conduct. Where the Commission has reason to believe that a "person, partnership, or corporation" is engaging in such conduct it can proceed to issue an administrative complaint against such "person, partnership, or corporation." 15 U.S.C. § 45 (b).

It was clear from the record in the subpoena enforcement proceeding below that the Commission's investigation was nothing more than a preliminary step leading to just such an enforcement proceeding against petitioner (Pa40 to Pa41, Pa52, Pa61, Pa63, Pa66 to Pa67). It is equally clear that Congress never intended agencies in the executive departments of state governments to be included as "persons" within the meaning

of Section 45, and thus the subjects of such federal administrative agency enforcement actions. The plain language and legislative histories of Section 45 and related sections of the act together with relevant case law show no intent to permit such extraordinary and possibly unconstitutional wholesale intrusion into the sensitive area of federal-state relations.

A. The Plain Language of the Provisions of the Federal Trade Commission Act and the Obvious Inferences to be Drawn Therefrom Clearly Limit the "Persons" Included in the Commission's Enforcement Authority to Private Entities Engaged in Business.

Within the Federal Trade Commission Act, the whole context of the sections in which "persons, partnerships, or corporations" appear as possible targets of FTC

enforcement proceedings relate to business milieus. With one significant exception, nowhere in the Act is the term "person" defined or used in a context to suggest a Congressional intent to include a state agency or officials within the ambit of the term. For example, the limiting exceptions in Section 45(a)(2) are all business entities. Also, the factors to be included in a penalty determination under Section 45(m)(1)(c) include "the effect on the ability to continue to do business." The additional powers of the Commission include investigations of the organization, business, conduct, practices and management of "persons, partnerships, or corporations." 15 U.S.C. § 46(a). The Commission is also required to reduce the impact of this section on "small businesses." In

Section 52, "persons, partnership or corporations" are prohibited from disseminating false advertisements inducing purchases of food, drugs, devices or cosmetics." This whole section obviously has no application to government agencies and yet the same phrase is used without qualification.* Finally, in civil actions by the Commission under

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* Significantly, the FTC's investigative authority under 15 U.S.C. § 49 was originally confined to corporations, but was amended to include "persons, partnerships or corporations" in 1975 only to parallel other sections of the Act. See P.L. 93-637, Title II, § 203. Comparison of this pointed repetition of "persons, partnerships, or corporations" in the FTCA with the use of the generic term "person" in the antitrust acts (see, e.g. 15 U.S.C. §§ 7, 12 and 15) provides another strong argument for the more limited scope of the FTCA term as simply describing the various possible kinds of business entities subject to the Commission's enforcement powers.

Section 57(b), the court may redress injury to "consumers or other persons, partnerships, or corporations" (obviously meaning consumers or other business entities, as competitors).

The conclusion that the "persons, partnerships or corporations" who may violate Section 45 are business entities is reinforced by the fact that, where "persons" is meant to include state entities, it is specifically so defined. In Section 57b-1 the term "persons," as used to designate those who may be called on as witnesses to give oral testimony or to produce documents in connection with an investigation, is defined for purposes of that section only to include "any natural person, partnership, corporation, association, or other legal entity, including any person acting under color

or authority of state law." This 1980 extension of the investigatory powers of the Commission simply made it clear that civil investigative demands could be served on "persons" other than the business entity that is the focus of the investigation and that all "persons" as defined in Section 57b-1 could be called upon as witnesses. That Congress deemed it necessary to expressly include agents of state governments in the definition of "persons" for this section strongly indicates that government entities were not intended to be included as targets of FTC enforcement authority elsewhere in the Act. Had Congress intended state agencies and officials to be included in the definition of "persons" under Section 45, Congress would have so specified as it did in Section 57b-1. Cf.

United States v. Cooper, 312 U.S. 600, 607 (1941).

B. The Legislative History of the FCTA Shows No Intent to Permit Administrative Enforcement Actions Against State Agencies. Moreover, Where Congress Has Spoken to the Issue of Antitrust Remedies Available Against Government Entities, It Has Evinced a Clear Intent to Limit Such Remedies to Court Actions Enjoining Enforcement of Preempted Enactments.

The legislative histories of the FTCA and its many amendments contain no hint of the possibility that the Commission's enforcement powers extended to state agencies or in fact to any public entity.* Nevertheless, the Commission

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* The legislative history of the Federal Trade Commission Improvements Act of 1980 does, however, call attention to

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asserted in its brief to the Court of Appeals that the 1975 Amendment (in

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the FTC's propensity to go beyond congressional intent in exercising its statutory powers. Thus, citing numerous instances of the FTC's incorrect assumption of jurisdiction, Congress enacted the FTC Improvements Act expressly limiting FTC rulemaking authority in the areas of used car warranties, children's advertising and voluntary standards and certifications of manufactured goods. The Improvements Act also amended § 6 of the FTCA to explicitly make the Commission's investigative and reporting powers inapplicable to the business of insurance because the FTC was misconstruing the jurisdictional limitations clearly set forth in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011- 1015, which declared that it was Congress' policy "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." The Senate Report on this bill noted that the FTC had for eighteen months devoted a "considerable portion of its resources" to insurance industry investigations that were unauthorized by its statute. S. Rep.

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P.L. 94-637, § 201(a)) substituting "in or affecting commerce" for "in commerce" wherever the phrase appeared within the FTCA extended Commission jurisdiction to include state regulatory bodies (Brief for Appellee, p. 22, n. 20). Yet, this argument is rebutted in the legislative history of the amendment, which speaks solely to remedying the geographic impediment to FTC jurisdiction where there was no proof of actual interstate movement of goods. See H.R. No. 93-1107, 93rd Cong. 2nd Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 7702, 7711-7712. See, also, Jefferson Cty. Pharm. Assoc.

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No. 96-500, 96th Cong., 2d. Sess. 2, 13-15, reprinted in 1980 U.S. Code Cong. & Admin. News 1102, 1103, 1114-1116.

v. Abbott Labs, 460 U.S. 150, 156 n. 12 (1983) (Robinson-Patman Act's coverage extending only to acts "in commerce" as compared to the Sherman and Clayton Acts extension to activity "in or affecting commerce" signifies a difference only in the "transactions" covered rather than that "Congress chose not to cover the same range of persons whose conduct is otherwise subject to the Act.")

Significantly, at the same time that the Commission began its numerous actions against state professional boards, an activity finding no support either in the provisions of the FTCA or in Congressional statements as to the Act's purpose and meaning, Congress was enacting the Local Government Antitrust Act of 1984, providing an explicit state-

ment of its intent to limit antitrust action against government entities to actions in the courts seeking injunctive relief against enactments allegedly preempted by the antitrust laws. This 1984 Act, codified as 15 U.S.C. §§ 34-36, was Congress' response to this Court's holding in Community Communic. Co. v. City of Boulder, 455 U.S. 40 (1982). The Boulder case appeared to support the finding of liability for damages as well as injunctive relief under the Clayton Act against a municipality exercising the purely governmental function of passing and enforcing an ordinance which was inconsistent with the antitrust laws and not saved from preemption by Parker "immunity." Congressional concern over the prospect of large damage awards against local governments prompted the

passage of the Act, which exempts local governments and their officials and employees from damages under the Clayton Act. The Act does not mention state governments or officials. The obvious inference to be drawn from the failure to include state agencies and officials within the protection of the Local Government Antitrust Act is that Congress assumed that state agencies were already "immune," at least from penalties and damages, and needed no such protection. This conclusion is confirmed by the Act's legislative history.* Congress accepted

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* Thus, House Report No. 98-965 noted that the legislative history of the Sherman Act "reveals no evidence of an express Congressional intent to apply antitrust laws to either state or local governments." H.R. No. 98-965, 98th

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the decision of this Court as to the interpretation of "persons" in the

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Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Adm. News 4602, 4605. Further, the House Committee noted that the Sherman Act was clearly directed at "combinations 'in restraint of trade' as that phrase was technically understood under English common law...." Id.

> Under English common law, "restraints of trade" applied solely to the actions of individuals; a "monopoly" could only arise from an act of sovereign power.... Thus restraint of trade prohibitions -- such as those appearing in statutes forbidding "engrossing" and "forestalling" -- were directed against "whatsoever person or persons...." No status or reported case has been found in which a "body politic", as opposed to a private person or "body corporate", was subjected to sanction under restraint of trade statutes. [Id. n. 2 (citations omitted)]

Clayton Act, but the clear sense of the Congressional action is that the appropriate relief against any government entity violating the antitrust laws should be limited to injunctive relief in the courts prohibiting the enforcement of objectionable legislation.*

The FTC's actions against state licensing boards envision, inter alia, potential monetary recovery see, e.g., 15 U.S.C. §§ 45(l)(m), expressly rejected by Congress as a salutary remedy available against local governments. See 15

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* The legislative history indicates that the Department of Justice or the FTC retained the right to seek injunctive relief from the courts in enforcement actions against local governments under other statutory provisions. H.R. No. 98-965, 98th Cong. 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 4602, 4603.

U.S.C. §§ 34-36. As previously noted, the legislative history of the Local Government Antitrust Act indicated that Congress assumed that such remedies were unavailable as against states. Thus, the FTC's exercise of jurisdiction in this matter is completely inconsistent with recent expressions of Congressional intent concerning antitrust remedies available against government entities.

C. FTC Enforcement Actions Against State Agencies Constitute an Unconstitutional Infringement on State Sovereignty.

As argued, ante, Congress clearly did not intend to grant the unprecedented authority the Federal Trade Commission has so boldly asserted here. Amicus also believes that the separate question of whether Congress could have intended to authorize such jurisdiction is one of

constitutional dimension, in that the Commission's mistaken assertion of jurisdiction over state agencies not only constitutes an offense to general principles of federalism but in fact exceeds the constitutional limits on federal action affecting the states under the Commerce Clause.

In Garcia v. San Antonio Metro, 469 U.S. 528 (1985) this Court, while raising the threshold beyond which legislation may be found to exceed the bounds of the Commerce Clause, nevertheless acknowledged that the States do retain "a significant measure of sovereign authority." Id. at 549 (quoting from Justice Powell's dissent in EEOC v. Wyoming, 460 U.S. 226, 269 (1983)). The Court declined, however, to "identify or define what affirmative limits the constitutional struc-

ture might impose on federal action affecting the States under the Commerce Clause." Id. at 556.*

Examination of the enforcement provisions of the FTCA and the ways in which they have already been utilized by the Commission against State professional boards clearly demonstrates that in this case the "affirmative limits" of federal power have been exceeded. The Commis-

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* The Commission's apparent erroneous belief that there are no such constitutional limits on its jurisdiction has already been noted in N.C. St. Bd. of Regis. for Pro. Eng. v. FTC, 615 F. Supp. 1155 (D.C. N.C. 1985) (dismissing on ripeness grounds a challenge to the Commission's issuance of subpoenas to a North Carolina professional board, where the Commission had not yet moved to enforce the subpoenas pursuant to 15 U.S.C. § 49). There, the Court pointed out that, despite the Commission's assertions, Garcia had not written the Tenth Amendment out of the Constitution. 615 F. Supp. at 1162, n. 7.

sion's statutory enforcement powers include prosecution in an administrative adjudication, the issuance of final cease and desist orders and the enforcement of those orders in actions seeking injunctions and substantial civil penalties. 15 U.S.C. § 45. Case law interpreting these provisions has accorded the FTC enormous power to fashion orders not only to halt past unlawful practices but to "fence in" future conduct.* There can

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* The breadth of the Commission's power to enforce Section 5 of its Act was described as including its power to declare unlawful under its Act practices that "conflict" with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws. FTC v. Brown Shoe Co., 384 U.S. 316, 320-321 (1966). In FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), the FTC was likened to a "court of equity" which is empowered to

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be no dispute that the focus of the Commission's investigation here is the exercise of the full panoply of these powers against the activity of a State agency exercising strictly governmental functions. The regulations challenged by the Commission have been enacted in accordance with Massachusetts law which gives them the same effect as state laws (See Pb15, Pa72 to Pa74). The Board is also empowered to enforce these regulations and may, after an administrative hearing, penalize its licensees for their

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consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." Id. at 244. See also, F.T.C. v. National Lead Co., 352 U.S. 419,431 (1957).

violation or the violation of the statutes governing the practice of pharmacy. (Mass. Gen. L., ch. 112, § 40, § 42A). Board decisions in these matters are appealable directly to the appellate courts (Mass. Gen. L., ch. 112, § 64). The exercise of these quasi-legislative and quasi-judicial functions are indisputably the attributes of state sovereignty.

The Massachusetts legislative scheme was enacted under its police powers and dates back to 1885. This kind of regulatory scheme is traditionally the exclusive province of the states. States license members of professions to ensure that they are qualified according to a standard set by the state and regulate their practice thereafter according to standards of conduct deemed necessary for

the protection of the health and safety of the public.* This Court has

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* The consensus of the states is that the regulation of professional services presents special problems, such as the establishing of qualifications for licensure, the examination of applicants and the setting of professional standards, which require that some of the regulators be members of the regulated community. The obvious direction of the Commission "investigation" in this case, where the Commission is proposing to question the Massachusetts Board, six members of which are pharmacists, about "the role of pharmacists and related professional and trade associations in the enactment, amendment, enforcement, and interpretation of the Regulations" (Pa61), is to directly interfere with the Board's regulatory and adjudicative functions and also to remold the basic structure of state regulation of the licensed professions.

The inquiry sanctioned by the Circuit Court below was by the Court's own description an inquiry grounded on the status of the Board members as members of the regulated profession who might, despite the fact that they are clearly public officials under the Massachusetts

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consistently recognized the states' special responsibilities in this regard. See, e.g., Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 460 (1978). See also, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) recognizing the states' strong interest in maintaining a high degree of professionalism on the

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statutory scheme, be acting as "private parties" in "any 'anticompetitive' Board activities" (Pa8). The sanction of such a fishing expedition without evidence or sound legal theory and without even requiring as a threshold inquiry an examination of the regulations at issue to determine whether they would on their face violate the antitrust laws (cf. Fisher v. City of Berkeley, 475 U.S. 260 (1986)) can only result in a chilling effect on the States' choice of appropriately constituted professional boards and on the willingness of competent professionals to serve as Board members.

part of licensed pharmacists (Id. at 766) and recognizing further that the regulation of the health professions is not the same as "dealing with traders in commodities, but with vital interests of public health" where different standards of conduct are required for consumer protection (concurring opinion of Chief Justice Burger at pp. 773-775, quoting from Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 612 (1935)).

In the face of this Court's historical recognition of the seminal role of the states in regulating the professions, the Commission now boldly asserts authority under 15 U.S.C. § 45 to act as a "super-board" in all the states, treating these state agencies no differently from any other business entity-respondent, filing administrative complaints and

issuing final orders forever binding the Boards as Boards in their future regulatory and adjudicative activity.*

The complaints and final consent orders already a matter of public record in cases of FTC enforcement actions against professional boards well illustrate the unconstitutional dimensions of the exercise of such enforcement powers against the states. While these cases have been settled by consent, the terms of the consent orders are entirely consistent with the exercise of the Commis-

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* Concerns for FTC attempts to act as a "super-legislature" allowed to "roam at large" have been expressed by Professor Milton Handler in his article Antitrust Law Reform, 82 Col. L. Rev. 1287, 1326 (1982). In New Jersey's experience the FTC representatives clearly felt authorized to actually dictate the substantive content and language of the advertising regulations of the Boards.

sion's authority under 15 U.S.C. § 45, were it to be construed to extend to public entities. For example in The Matter of the Montana Board of Optometrists, FTC Docket No. C-3161, 50 Fed. Reg. 24203, the final consent order enjoins the Board from adopting, maintaining or enforcing "rules," "policies" or "any course of conduct" that would "prohibit" or "discourage" the advertising of price-related terms or claims of superiority in advertising ophthalmic goods and services (Id. at p. 24205). The order, in vague and overbroad terms, in effect permanently enjoins the Montana Board from promulgating and enforcing rules arguably within its mandate from the Montana Legislature. It actually ranges in scope all the way from dictating the kind of postage to be used for required notice to licensees to

requiring the repeal of current regulations. Id. at pp. 24205-24206.

To fully comprehend the dimensions of the intrusiveness of Commission orders purporting to enjoin both regulatory and adjudicative activities by the Board, one need only contrast them with the policies underlying Younger v. Harris, 401 U.S. 37 (1971). In Younger and later cases, it was held that principles of comity and federalism forbid enjoining pending state proceedings except in the rare case where such an action is necessary to avoid great and immediate irreparable injury. Indeed, this Court has recently extended the Younger abstention holding to forbid interference by federal courts in state administrative proceedings. See Ohio Civil Rights Comm'n v. Dayton Schools, 477 U.S. 619 (1986). Thus, the Commis-

sion is boldly asserting the authority to do what normally is forbidden even to the federal courts.

As this Court found in Middlesex Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982) (reversing a decision not to abstain from consideration of a challenge to attorney disciplinary proceedings) the State has an important interest in assuring the professional conduct of licensed attorneys and there was no reason to assume that a competent State tribunal could not decide the First Amendment issue raised by the challenge. Id. at 434-435. Similarly, the enforcement activity undertaken by the Commission in contravention of important State interests with respect to other licensed professionals is not even necessary to protect the federal interest in antitrust

law enforcement, where adequate remedies to avoid unnecessarily anticompetitive regulation exist in state procedures for review of regulations and in the possibility of private parties' obtaining injunctive relief from the courts.

Most importantly, the Commission's asserted authority here to interfere with states' historical regulation of the professions by affirmatively intruding upon a state agency's legislative and adjudicative processes is clearly qualitatively different from the Congressional assertion of power to simply preempt (and thus render void) State legislation, or to require a State as employer to comply with the Fair Labor Standards Act as in the Garcia case. Nor can it be compared with a requirement that a State seek approval or certification of standards in

order to exercise an option to receive benefits from a federal funding program. See, e.g., King v. Smith, 392 U.S. 309, 333 (1968).

Indeed, even in the context of a federal funding program this Court has recognized limitations upon supersedure of state law. Thus, in Bowen v. American Hospital Assn., 476 U.S. 610 (1986) this Court, while holding that certain regulations of the Secretary of Health and Human Services (HHS), including regulations imposing obligations on state child protective agencies, were not authorized by federal law, found that such agencies might be required to document their compliance with federal law to receive federal funding but that they could not be required to act as "field offices of the HHS bureaucracy." Id. at p. ___.

Significantly, this Court further noted that to uphold the attempt by HHS to "give detailed marching orders to state agencies" would be to "countenance a novel and serious intrusion on state autonomy." Id. at p. ___, n. 26.

Similarly, what is at issue here is the unprecedented assertion of federal authority to try a State agency in an administrative tribunal for the "offense" of having promulgated regulations that may or may not be preempted by the federal antitrust laws, and to issue an administrative agency order subjecting the State agency to direct oversight by the Commission, thus usurping the State's authority in its future regulatory and adjudicative activities.

It is, therefore, evident that legislative sanction of this degree of

direct intervention by a federal agency into the legislative and adjudicative activities of a state agency would improperly cross over the line between the power granted to Congress under the Commerce Clause and the "reserved" powers of the States.

D. The Commission's Asserted Authority to Investigate the Activities of Petitioners for the Purpose of Determining Whether to Initiate An Enforcement Proceeding Was Plainly Spurious and the Subpoenas Issued to Petitioners Should Have Been Quashed.

The question of whether the Commission has the authority to subpoena witnesses in an investigation admittedly being conducted for the purpose of determining whether to file an administrative complaint against a state agency such as the Massachusetts Board is purely a ques-

tion of law, the resolution of which requires interpretation of the FTCA. In support of its decision in this matter, the Circuit Court quoted the following passage from Federal Trade Commission v. Swanson, 560 F.2d 1 (1st Cir. 1977):

> An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly spurious. [Id. at 2.]

Amicus respectfully submits that this case fits squarely within the "narrow exception proscribing agency investigations that wander unconscionably far afield." For the reasons stated in the foregoing argument it is clear that the FTCA does not and, indeed, could not

grant such unprecedented authority to the Commission. The assertion of this authority is, therefore, "plainly spurious" and the subpoenas should not have been enforced.

CONCLUSION

Amicus respectfully submits for the foregoing reasons that the petition for certiorari should be granted.

Respectfully submitted,

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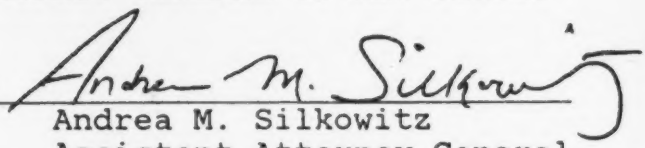
By 
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